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7 W2005 NEW CENTURY
HOTEL PORTFOLIO, L.P.

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9 UNITED STATES DISTRICT COURT
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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12 ROBERT MCCARTHY,) CASE NO. C:07-05859-HRL
13 Plaintiff,)
14 v.) W2005 NEW CENTURY HOTEL
15 W2005 NEW CENTURY HOTEL) PORTFOLIO, L.P.'S ANSWER TO
16 PORTFOLIO, L.P.; and DOES 1-10,) PLAINTIFF'S COMPLAINT
17 inclusive,)
18 Defendants.)

19 Defendant W2005 NEW CENTURY HOTEL PORTFOLIO, L.P. ("Defendant")
20 answers the allegations contained in plaintiff's complaint as follows:

21 **INTRODUCTION**

22 1. Paragraph 1 of the Complaint contains conclusory statements of law, not
23 fact, and therefore does not require a response. In an abundance of caution, however,
24 Defendant denies that it has in the past or at present are engaging in discriminatory
25 practices against individuals with disabilities. As to the remaining allegations, defendant
26 lacks sufficient knowledge to admit or deny the allegations contained therein and,,
27 therefore, denies them.
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INTRADISTRICT ASSIGNMENT

2. Responding to paragraph 2 of the Complaint, Defendant does not dispute that this Court is the proper venue for this matter.

JURISDICTION and VENUE

3. Responding to paragraph 3 of the Complaint, Defendant does not dispute the basis for which this Court is the proper venue for this matter.

SUPPLEMENTAL JURISDICTION

4. Responding to paragraph 4 of the Complaint, Defendant does not dispute that this Court has jurisdiction to preside over this matter at this time. Defendant denies all remaining allegations therein.

PARTIES

5. Defendants admit the allegations of paragraph 5 of the Complaint.

6. Responding to paragraph 6 of the Complaint, Defendant lacks sufficient knowledge to admit or deny the allegations contained therein and, therefore, denies them.

7. Responding to paragraph 7 of the Complaint, Defendant lacks sufficient knowledge to admit or deny the allegations contained therein and, therefore, denies them.

8. Responding to paragraph 8 of the Complaint, Defendant lacks sufficient knowledge to admit or deny the allegations contained therein and, therefore, denies them.

FACTS

9. Responding to paragraph 9 of the Complaint, Defendant lacks sufficient knowledge to admit or deny the allegations contained therein and, therefore, denies them.

10. Responding to paragraph 10 of the Complaint, Defendant lacks sufficient knowledge to admit or deny the allegations contained therein and, therefore, denies them.

1 11. Responding to paragraph 11 of the Complaint, Defendant lacks sufficient
2 knowledge to admit or deny the allegations contained therein and, therefore, denies
3 them.

4 12. Responding to paragraph 12 of the Complaint, Defendant lacks sufficient
5 knowledge to admit or deny the allegations contained therein and, therefore, denies
6 them.

7 13. Responding to paragraph 13 of the Complaint, Defendant lacks sufficient
8 knowledge to admit or deny the allegations contained therein and, therefore, denies
9 them.

10 14. Responding to paragraph 14 of the Complaint, Defendant lacks sufficient
11 knowledge to admit or deny the allegations contained therein and, therefore, denies
12 them.

13 15. Responding to paragraph 15 of the Complaint, Defendant lacks sufficient
14 knowledge to admit or deny the allegations contained therein and, therefore, denies
15 them.

16 16. Responding to paragraph 16 of the Complaint, Defendant lacks sufficient
17 knowledge to admit or deny the allegations contained therein and, therefore, denies
18 them.

19 17. Responding to paragraph 17 of the Complaint, Defendant lacks sufficient
20 knowledge to admit or deny the allegations contained therein and, therefore, denies
21 them.

22 18. Responding to paragraph 18 of the Complaint, Defendant lacks sufficient
23 knowledge to admit or deny the allegations contained therein and, therefore, denies
24 them.

25 19. Responding to paragraph 19 of the Complaint, Defendant lacks sufficient
26 knowledge to admit or deny the allegations contained therein and, therefore, denies
27 them.

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20. Responding to paragraph 20 of the Complaint, Defendant lacks sufficient knowledge to admit or deny the allegations contained therein and, therefore, denies them.

21. Responding to the first sentence of paragraph 21 of the Complaint, such allegations are mere conclusions of law, not fact, and do not require a response. As to the remaining allegations, Defendant denies them.

22. Responding to paragraph 22 of the Complaint, Defendant lacks sufficient knowledge to admit or deny the allegations contained therein and, therefore, denies them.

23. Responding to paragraph 23 of the Complaint, Defendant lacks sufficient knowledge to admit or deny the allegations contained therein and, therefore, denies them.

NOTICE

24. Paragraph 24 of the Complaint contains conclusory statements of law, not fact and, therefore, does not require a response. In an abundance of caution, however, Defendant lacks sufficient knowledge to admit or deny the allegations contained therein and, therefore, denies them.

25. Paragraph 25 of the Complaint contains conclusory statements of law, not fact and, therefore, does not require a response. In an abundance of caution, however, Defendant lacks sufficient knowledge to admit or deny the allegations contained therein and, therefore, denies them.

26. Paragraph 26 of the Complaint contains conclusory statements of law, not fact and, therefore, does not require a response. In an abundance of caution, however, Defendant lacks sufficient knowledge to admit or deny the allegations contained therein and, therefore, denies them.

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FIRST CAUSE OF ACTION (*sic*)

CLAIM I – Denial of Full and Equal Access

27. Responding to paragraph 27 the Complaint, Defendant incorporates by reference its responses to paragraphs 1 through 27 as though set forth fully herein. Further responding, Defendant admits that the facility in question is a place of public accommodation, and specifically denies that remaining allegations of Paragraph 27.

28. Responding to paragraph 28 of the Complaint, Defendant lacks sufficient knowledge to admit or deny the allegations contained therein and, therefore, denies them..

CLAIM II – Failure to Make Alterations

29. Responding to paragraph 29 the Complaint, Defendant incorporates by reference its responses to paragraphs 1 through 28 as though set forth fully herein. Defendant denies that remaining allegations of Paragraph 29..

30. Defendant lacks sufficient knowledge to admit or deny the allegations contained in Paragraph 30 of the Complaint and, therefore, denies them.

31. Paragraph 31 of the Complaint contains conclusory statements of law, not fact and, therefore, does not require a response. In an abundance of caution, however, Defendant lacks sufficient knowledge to admit or deny the allegations contained therein and, therefore, denies them.

32. Paragraph 32 of the Complaint contains conclusory statements of law, not fact and, therefore, does not require a response. In an abundance of caution, however, Defendant lacks sufficient knowledge to admit or deny the allegations contained therein and, therefore, denies them..

CLAIM III – Failure to Remove Architectural Barriers

33. Responding to paragraph 33 the Complaint, Defendant incorporates by reference its responses to paragraphs 1 through 32 as though set forth fully herein. The remaining allegations of Paragraph 33 of the Complaint contains conclusory statements of law, not fact and, therefore, does not require a response. In an abundance of caution,

1 however, Defendant lacks sufficient knowledge to admit or deny the allegations
2 contained therein and, therefore, denies them.

3 **CLAIM IV – Failure to Modify Practices, Policies and Procedures**

4 34. Responding to paragraph 34 the Complaint, Defendant incorporates by
5 reference its responses to paragraphs 1 through 33 as though set forth fully herein. The
6 remaining allegations of Paragraph 34 of the Complaint contains conclusory statements
7 of law, not fact and, therefore, does not require a response. In an abundance of caution,
8 however, Defendant lacks sufficient knowledge to admit or deny the allegations
9 contained therein and, therefore, denies them.

10 35. Responding to paragraph 35 the Complaint, Defendant incorporates by
11 reference its responses to paragraphs 1 through 34 as though set forth fully herein. The
12 remaining allegations of Paragraph 35 of the Complaint contains conclusory statements
13 of law, not fact and, therefore, does not require a response. In an abundance of caution,
14 however, Defendant lacks sufficient knowledge to admit or deny the allegations
15 contained therein and, therefore, denies them.

16 36. Paragraph 36 of the Complaint contains conclusory statements of law, not
17 fact and, therefore, does not require a response. In an abundance of caution, however,
18 Defendant lacks sufficient knowledge to admit or deny the allegations contained therein
19 and, therefore, denies them.

20 **SECOND CAUSE OF ACTION (*sic*)**

21 **CLAIM I – Denial of Full and Equal Access**

22 37. Responding to paragraph 37 the Complaint, Defendant incorporates by
23 reference its responses to paragraphs 1 through 36 as though set forth fully herein. The
24 remaining allegations of Paragraph 37 of the Complaint contains conclusory statements
25 of law, not fact and, therefore, does not require a response. In an abundance of caution,
26 however, Defendant lacks sufficient knowledge to admit or deny the allegations
27 contained therein and, therefore, denies them.

1 38. Paragraph 38 of the Complaint contains conclusory statements of law, not
2 fact and, therefore, does not require a response. In an abundance of caution, however,
3 Defendant lacks sufficient knowledge to admit or deny the allegations contained therein
4 and, therefore, denies them.

5 **CLAIM II – Modify Practices, Policies and Procedures**

6 39. Responding to paragraph 39 the Complaint, Defendant incorporates by
7 reference its responses to paragraphs 1 through 38 as though set forth fully herein. The
8 remaining allegations of Paragraph 39 of the Complaint contains conclusory statements
9 of law, not fact and, therefore, does not require a response. In an abundance of caution,
10 however, Defendant lacks sufficient knowledge to admit or deny the allegations
11 contained therein and, therefore, denies them.

12 **CLAIM III – Violation of the Unruh Act**

13 40. Responding to paragraph 40 the Complaint, Defendant incorporates by
14 reference its responses to paragraphs 1 through 39 as though set forth fully herein. The
15 remaining allegations of Paragraph 40 of the Complaint contains conclusory statements
16 of law, not fact and, therefore, does not require a response. In an abundance of caution,
17 however, Defendant lacks sufficient knowledge to admit or deny the allegations
18 contained therein and, therefore, denies them.

19 41. Responding to paragraph 41 the Complaint, Defendant incorporates by
20 reference its responses to paragraphs 1 through 40 as though set forth fully herein.
21 Paragraph 40 of the Complaint contains conclusory statements of law, not fact and,
22 therefore, does not require a response. In an abundance of caution, however, Defendant
23 lacks sufficient knowledge to admit or deny the allegations contained therein and,
24 therefore, denies them. Defendant further denies plaintiff is entitled to any relief
25 whatsoever.

26 42. Paragraph 42 of the Complaint contains conclusory statements of law, not
27 fact and, therefore, does not require a response. In an abundance of caution, however,
28 Defendant lacks sufficient knowledge to admit or deny the allegations contained therein

1 and, therefore, denies them. Defendant further denies plaintiff is entitled to any relief
2 whatsoever.

3 43. Paragraph 43 of the Complaint contains conclusory statements of law, not
4 fact and, therefore, does not require a response. In an abundance of caution, however,
5 Defendant lacks sufficient knowledge to admit or deny the allegations contained therein
6 and, therefore, denies them. Defendant further denies plaintiff is entitled to any relief
7 whatsoever.

8 44. Paragraph 44 of the Complaint contains conclusory statements of law, not
9 fact and, therefore, does not require a response. In an abundance of caution, however,
10 Defendant lacks sufficient knowledge to admit or deny the allegations contained therein
11 and, therefore, denies them. Defendant further denies plaintiff is entitled to any relief
12 whatsoever.

13 45. Paragraph 45 of the Complaint contains conclusory statements of law, not
14 fact and, therefore, does not require a response. In an abundance of caution, however,
15 Defendant lacks sufficient knowledge to admit or deny the allegations contained therein
16 and, therefore, denies them. Defendant further denies plaintiff is entitled to any relief
17 whatsoever.

18 46. Paragraph 46 of the Complaint contains conclusory statements of law, not
19 fact and, therefore, does not require a response. In an abundance of caution, however,
20 Defendant lacks sufficient knowledge to admit or deny the allegations contained therein
21 and, therefore, denies them. Defendant further denies plaintiff is entitled to any relief
22 whatsoever.

23 **DEMAND FOR JUDGMENT FOR RELIEF**

24 Defendant denies plaintiff has been injured in any manner as described in the
25 complaint, and denies that plaintiff is entitled to any declaratory or injunctive relief,
26 costs of litigation, attorney's fees, or any other kind of relief or damages whatsoever.

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AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The complaint fails to allege facts sufficient to state a claim against defendant.

SECOND AFFIRMATIVE DEFENSE

The complaint, and each claim asserted, is barred by the doctrine of unclean hands.

THIRD AFFIRMATIVE DEFENSE

The complaint, and each claim asserted, is barred by the doctrine of estoppel.

FOURTH AFFIRMATIVE DEFENSE

The complaint, and each claim asserted, is barred by the doctrine of laches.

FIFTH AFFIRMATIVE DEFENSE

The complaint, and each claim asserted, is barred by the applicable statutes of limitations.

SIXTH AFFIRMATIVE DEFENSE

Defendant asserts plaintiff freely and voluntarily assumed the risk of injury and damage alleged in this action with full knowledge and appreciation of the magnitude thereof, and did so with the intent to seek out a lawsuit and compound damages.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff is barred from recovery by his own careless, negligent and willful conduct, all of which proximately caused any damage claimed in this action.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiff failed to exercise reasonable diligence to mitigate his damages, if any, as alleged in the complaint, and said conduct was the sole and proximate cause of said injuries.

NINTH AFFIRMATIVE DEFENSE

Plaintiff's damages, if any, were brought about by the conduct of other parties and/or entities.

TENTH AFFIRMATIVE DEFENSE

Defendant' conduct is, and was at all times, justified, reasonable and in good faith.

ELEVENTH AFFIRMATIVE DEFENSE

Defendant is exempt from compliance with the statutes and/or regulations sought to be enforced by plaintiff.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiff lacks Article III standing to assert claims for injunctive and/or declaratory relief, and lacks standing to assert claims for injunctive and/or declaratory relief unrelated to his disability.

THIRTEENTH AFFIRMATIVE DEFENSE

The violations plaintiff alleges are within the dimensional tolerances allowed by state and federal law.

FOURTEENTH AFFIRMATIVE DEFENSE

Some or all of plaintiff's alleged violations and proposed changes are impracticable, unnecessary, unduly burdensome, and infeasible. Moreover, Defendant is informed and believe that reasonable alternative methods/measures providing access to individuals with disabilities with equivalent facilitation or otherwise to the maximum extent feasible are utilized.

FIFTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims for injunctive relief and declaratory relief are moot.

SIXTEENTH AFFIRMATIVE DEFENSE

Inasmuch as each defendant did not own, operate, lease and/or control the business, property, building and/or portions thereof, during the period in which the alleged violations occurred, defendant is not a proper party to some or all of the claims asserted, or to any claim for injunctive and/or declaratory relief.

WHEREFORE, Defendant pray for judgment as follows:

1. That all relief sought in the complaint against defendant be denied;

- 1 2. That plaintiff's complaint be dismissed, with prejudice, in its entirety;
2 3. For an award against plaintiff, in favor of Defendant, of costs of suit and
3 attorneys' fees incurred; and
4 4. For such other and further relief as the court deems proper.

5 DATED: December 27, 2007

GREENBERG TRAURIG, LLP

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7 By: 

8 KATHLEEN E. FINNERTY

9 MARC B. KOENIGSBERG

Attorneys for Defendant

10 W2005 NEW CENTURY HOTEL
11 PORTFOLIO, L.P.
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